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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 299

JERSEY CENTRAL POWER AND LIGHT COMPANY,
Petitioner,

v.

THE FEDERAL POWER COMMISSION,
Respondent.

BRIEF FILED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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....., 1942.

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OPINIONS BELOW.

The Order of the Federal Power Commission is printed at page 936 of the record. The Opinion of the Circuit Court of Appeals for the Third Circuit is printed at page 1113 of the record. Neither has yet been officially reported.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several States of the United States except two, one of which has no State regulatory commission.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President and also of the Executive Committee of said Association, in the general public interest.

STATEMENT OF THE CASE.

The judgment below affirmed a decision of the Federal Power Commission, hereinafter called the Federal Commission, holding the Petitioner, the Jersey Central Power and Light Company, hereinafter called the Jersey Central, to be a public utility subject to the jurisdiction of that Commission.

Said decision was rendered in a proceeding begun by the Commission, on its own motion, against the New Jersey Power and Light Company, a public utility admittedly subject to the Commission's jurisdiction. That Company had acquired securities of the Jersey Central without first procuring an order of the Federal Power Commission authorizing the acquisition. Thereupon the Commission instituted a proceeding against said New Jersey Power and Light Company ordering it to show cause why such acquisition of securities should not be held in violation of Section 203(a) of the Federal Power Act. (49 Stat. 849, 16 U. S. C. A., Sec. 824b(a), which section makes it unlawful for a public

utility subject to the Act to acquire securities of another such public utility without first procuring such authority. The Jersey Central intervened in that proceeding, and denied that it was a public utility subject to the jurisdiction of the Federal Commission. That Commission held that it was so subject. (R. 1114) The court below affirmed that decision. (R. 1134)

The sole question involved is whether the Jersey Central is subject to the jurisdiction of the Federal Commission.

STATEMENT OF FACTS.

The Jersey Central is engaged in the generation and distribution of electric energy in the State of New Jersey. All of its physical property is located in that State. It sells only to customers in New Jersey. It does not own or operate any facilities which cross any State line. (R. 1114)

The principal business of Jersey Central is the retail sale of electric energy to the public. However, Jersey Central exchanges electric energy with another electric utility, Public Service Electric Company, hereinafter called Public Service. In the course of these exchanges, it from time to time transmits electric energy to Public Service, and from time to time receives energy from Public Service. (R. 1117) It is upon such transmission between the two companies that the Federal Power Commission's decision in question in this case is rested. (R. 1121)

For the purpose of effecting the exchanges of electric energy just referred to, Jersey Central maintains a transmission line, owned and operated by it, from its power plant in South Amboy, New Jersey to a point on the South bank of the Raritan River, a distance of 7/8ths of a mile. At that point the line connects with a submarine cable owned by Public Service which crosses the Raritan River and runs to the Public Service Mechanic Street Station at Perth Amboy. Over these connecting facilities the exchanges mentioned are made. (R. 1115)

The exchange transactions are of two kinds: One is so-called emergency or break down service by which, in case of a break down on either system, energy may be supplied from the other system. The other is the interchange of so-called economy flow energy, under an arrangement whereby delivery of energy takes place to either company whenever the delivering company is able to generate at less cost than the receiving company could generate with its own facilities. The purpose of the interchange of economy flow energy is to accomplish the possible savings, which are divided between the two companies. (R. 1116) At the Mechanic Street Station of Public Service at Perth Amboy, energy transmitted from the Jersey Central station is received at the bus bar, upon which there are a considerable number of connections, one of which is with a transmission line which connects the plant of Public Service with the plant of Staten Island Edison Company, hereinafter called Staten Island, in the State of New York. (R. 1115)

Over this transmission line, connecting the plants of Public Service and Staten Island, electric energy is interchanged from time to time in so-called emergency service, if and when either of said companies has need of such service. Furthermore, because the systems of the two companies are thus connected, whenever there is a sudden demand for more energy upon one system, there is a tendency for it to draw upon the system with which it is connected for the instantaneous period between the demand and the resulting speed up of its own generators to supply that demand. Since the system of Public Service is connected not only with Staten Island but with Jersey Central and "also with other electrical transmission systems covering the southern part of New Jersey, the southeastern part of Pennsylvania, and the northeastern part of Maryland and Delaware" there is the same tendency to draw energy to any one of these systems, upon which there is such a sudden demand, from the other connected systems for such instantaneous speed up period. Accordingly, "it is obvious

that there will be some incidental or slop-over current (as it is called) passing through the various system connections, including the Mechanic Street Substation which comprise the connections between Jersey Central and Public Service on the one hand and Public Service and the Staten Island Company on the other. (Opinion below. R. 1117-1118)

Jersey Central does not sell electric energy to Staten Island and has no contractual relations whatever with it. Its relations with Public Service are wholly independent of any contractual relations between Public Service and Staten Island. (R. 1133) The Commission found, however, that at times when energy is flowing from Jersey Central to Public Service energy is also flowing from Public Service to Staten Island, and that there is, in fact, at such times, a flow of energy from Jersey Central to Staten Island. Readings taken on 184 occasions showed that such direct flow of energy to Staten Island happened on 24 of such occasions. (R. 1119)

Solely upon the basis of this finding, that upon some occasions some of the energy received by Public Service from Jersey Central is instantaneously transmitted in interstate commerce to Staten Island, the Commission held Jersey Central to be a public utility subject to its jurisdiction under the Federal Power Act. (R. 1121)

Upon appeal, the court below found that it was "beyond dispute that Jersey Central sells no electricity directly in interstate commerce." (R. 1128) As respects the flow of energy from Jersey Central to Staten Island, through Public Service, the court found as follows:

> "How much of the electricity which flowed from Public Service to the Staten Island Company originated in Jersey Central's South Amboy generators and passed over the connecting line from South Amboy to the Mechanic Street Substation and thence through the bus-bar to the Staten Island Company no one can say. It is certain that *some* did go to the Staten Island Company. Measured in terms of the KWH generated and

transmitted by large electric public utility systems *it was small.*" (R. 1121. Italics supplied). The court, however, sustained the Commission's decision, saying:

"We think that Congress intended to impose regulation upon those public utilities which operate facilities for the transmission of electricity in interstate commerce, transmission in interstate commerce being defined as electricity transmitted from a state and consumed at any point outside its borders.



. . . . . .

Some part of the electricity passing from the Jersey Central system to the Public Service system moved in interstate commerce and *reached the Staten Island Company.* That electric energy was transmitted in interstate commerce within the meaning of Section 201(c) *if the words of the subsection be applied literally.* The facilities of Jersey Central were in fact employed for this transmission. This was not an accident. Once the circuit between the Jersey Central generating plant and the Staten Island Company (fol.1142) was closed, inevitably electricity flowed from Jersey Central to the Staten Island Company. That result was not only not unexpected, it was unavoidable. The fact that Jersey Central sold this electricity to Public Service rather than to Staten Island does not serve to put the flow out of commerce. *Once electricity flowed from the Jersey Central* generating plant to the Staten Island Company, commercial transactions between the three companies under their respective contractual relations and arrangements followed. *This was interstate commerce within the meaning of the Commerce Clause.*" (R. 1132-1133. Italics supplied.)

THE QUESTION PRESENTED.

It will be perceived that the court sustained the Commission's decision because of the ownership by Jersey Central of the 7/8 mile of transmission line over which it transmits electric energy to Public Service, which energy, without interruption of movement, is by that company transmitted to a destination in another State, where it is ultimately consumed. This is held to be ownership of a facility used in interstate commerce.

The question presented is whether Jersey Central, the property of which is located wholly within the state of New Jersey, which sells and transmits electric energy only in New Jersey, is subject to the jurisdiction of the Federal Commission because some of the energy which it transmits to Public Service is by that Company used in its exchange transactions with Staten Island, and is thus transmitted in interstate commerce.

REASONS FOR GRANTING THE WRIT.

The decision of the court below should be reviewed by this court because it erroneously construes a Federal statute in such manner as to give to the Federal Commission jurisdiction over a public utility which is in no way engaged in interstate commerce, in disregard of the plain intent of Congress. The legal question involved is highly important. It has not been but should be, passed upon by this court.

The decision of the Federal Commission, sustained by the court below, in effect is that if electric energy, transmitted over the lines of one utility to another utility, is finally in any part transmitted across a State line, either by the second utility, or by any other utility upon the lines of which the same may come, then every utility, upon the lines of which such energy flows, is subject to the jurisdiction of the Federal Commission. That decision, if sustained, will bring under the jurisdiction of the Federal Commission a very large proportion of the important intrastate electric utilities in the several states of the United States, in disregard of the intent of Congress, and in violation of the right of the states to regulate their internal affairs.

Such misconstruction of the Act should at once be corrected by a decision of this court, so that the Commission may understand and observe the limits of its jurisdiction, as fixed by Congress, and so that the States may be left undisturbed in the exercise of their proper powers, which the Congress designed to preserve.

SUMMARY OF ARGUMENT.

1. (Pages 14-17). Congress intended to limit the jurisdiction of the Federal Commission to the business of "transmitting and selling" electric energy in interstate commerce at wholesale, in such manner as to be beyond the reach of State regulation. Transmission in interstate commerce not for sale at wholesale was not intended to be regulated under the Act.

The question presented is one of construction of the Federal Power Act, and a correct construction can be reached only by keeping in mind the intended purpose of Congress when it enacted the statute. The jurisdictional provisions of the statute are easy to understand if the situation which faced Congress is considered. Opinions of this court in *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 23, and in other cases, had held interstate sales of utilities directly to customers to be local in character and subject to State regulation. On the other hand, interstate sales at wholesale, from one utility to another, for resale, this court in *Public Utilities Commission* v. *Attleboro*, etc., 273, 83, and other cases, had held to be national in character, and beyond the reach of State power. This left a gap in regulation which the Federal Commission and the State commissions united in asking Congress to fill. The Federal Power Act was enacted in response to that request, for the declared purpose only of filling that gap.

2. (Pages 17-25). The legislative history of the Act, and the language of the Act itself, each shows with singular clearness the intent of Congress not to impair or displace State regulation as to any matter of distribution or sale which, under the Federal Constitution, as construed by this court, was within the reach of State regulation.

When the Act was under consideration by Congress, Federal and State commissioners testified that the need for Federal regulation extended only to interstate transmission and sale by one utility to another at wholesale, and asked that State authority be not disturbed as to local transactions.

The Senate and the House, in revision of the bill, made changes designed to preserve State power from impairment, and the respective committees of the two Houses made clear that the purpose of the legislation was to cover the regulatory field with respect to interstate transmission and sale of electric energy at wholesale, held by this court in the *Attleboro Case* to be beyond the reach of State regulatory power.

3. (Pages 25-27). The Federal Power Act can not be so construed as to extend Federal regulation to the Jersey Central without impairing or displacing State authority as to a large class of electric utilities heretofore subject to exclusive regulation by the respective states, in disregard of the plainly expressed intent of Congress.

It is beyond question that, unless prevented by Federal regulation, New Jersey may regulate all the activities of Jersey Central.

Generation of electric energy is a local activity subject to State control. *Utah L. & P. Co. v. Pfost*, 280 U. S. 167, 181-182. Generation by Jersey Central was not for sale in interstate commerce. All of the business of that company was intrastate, including its exchange transactions with Public Service. None was within the category of matters "not subject to regulation by the States."

Accordingly, to the extent to which the construction of the court below may subject the Jersey Central to regulation by the Federal Commission, such construction disregards the plainly expressed intent of Congress. The effect of it will be to impair or displace State regulation as to a large class of utilities heretofore subject to exclusive State regulation.

4. (Pages 27-29). The words "such regulation, however, to extend only to those matters which are not subject to regulation by the States" may not be disregarded in determining the application of the Federal Power Act.

No contention is here made, that those words should receive such a construction as to exclude from the jurisdiction of the Federal Commission every matter whatsoever which

could be reached by State regulation. They were designed as a guide, in the construction of the Act, to accomplish the intended purpose of Congress to protect and preserve State regulation.

The plain purpose of Congress was that the Act should be so construed as not to bring under Federal regulation matters of distribution and sale of an intrastate or local character, which were subject to such State regulation. Every sale of electric energy, except a "sale at wholesale in interstate commerce," was expressly excluded from the application of the Act. In this case, no "sale at wholesale in interstate commerce" by Jersey Central, such as the Congress designed to bring under Federal regulation, has been shown.

Generation of the energy transmitted by Jersey Central to Public Service was a local transaction. *Utah P. & L. Co. v. Pfost*, 280 U. S. 165, 182. Such energy was disposed of to Public Service in intrastate commerce. The fragment of transmission line used in making delivery was accordingly a facility used "in local distribution," and "in intrastate commerce," and was thus doubly excluded from the jurisdiction of the Federal Commission under the express language of Section 201(b).

To hold that Jersey Central's disposition of energy to Public Service was not in intrastate commerce, because some part of the same may have flowed instantaneously to an ultimate destination in another State, is in effect to hold that no sale of electric energy in intrastate commerce can ever be made in a situation in which any person, into whose control any part of such energy shall come, shall so use the same as to permit any part thereof to flow across a State line for consumption in another State. This is not a practical conception of the effect of the Commerce Clause of the Federal Constitution.

5. (Pages 29-32). If the exchange transactions of Jersey Central with Public Service can be held so connected with interstate commerce as to be "in interstate commerce" they are, nevertheless, local in character, and not designed by Congress to be subject to regulation under the Act.

Such transactions are incident to the intrastate commerce in which Jersey Central is engaged. They affect the interests of consumers in other states, if at all, only indirectly, and so slightly as to fall within the rule of *Pennsylvania Gas Company Case*, 252 U. S. 23, 29. They do not fall within the reasoning of the *Attleboro case*, 273 U. S. 83, 87-90.

Not only is Federal regulation of such transactions unnecessary, but, to the extent that the burdens of such Federal regulation may act as a deterrent to the making of interconnections by electric utilities for the accomplishment of economies of operation and of betterment of service, such Federal regulation would be inimical to the public interest, for reasons aside from its impairment of State regulation.

This court has clearly held that, in the construction of a statute, the purpose of Congress must be given effect, even though it may be necessary to disregard the ordinary meaning of words considered in isolation. *Tex. & P. R. Co. v. Gulf Colo. & S. F. Ry. Co.*, 270 U. S. 266, 277; *American Trucking Association v. United States*, 310 U. S. 534, 542.

In this case there is no occasion to deny its natural meaning to any of the language either of Section 201(a), or (b). It is necessary only to give a construction to the words "all facilities for such transmission or sale * * *" in Section 201(b) which is consistent with other portions of the Act, including the declaration of Congressional purpose in Section 201(a).

The word "such" is of paramount importance. That word and its context relate back to the preceding sentence and to the language of Section 201(a), and connote only those transactions of transmission and sale "which are not subject to regulation by the States."

Jersey Central neither owns nor operates any facility used "for *such* transmission or sale" as Congress designed to bring under regulation. Hence Jersey Central does not fall within the definition of Section 201(e). That subsection, like every other provision of the Act, must be read in connection with all other provisions of the Act, and especially in the light of the declared purpose of Congress.

In the light of that declared purpose and of such other provisions of the Act, Section 201 (c) means only that energy shall be deemed transmitted in interstate commerce, for the purpose of regulation under the Act, when transmitted for a sale in interstate commerce of the character to which the Act was designed to apply, and for consumption outside the State where generated.

6. (Pages 32-34). The court below erred in treating the question presented in this case as involving only one of Congressional power. The question presented is not one of Congressional power, but of Congressional intent.

The language of the opinion below indicates that the court, having found as a fact that the transactions between Jersey Central and Public Service were "in interstate commerce," in its view of the law, treated that fact as determinative of the Federal Power Commission's jurisdiction. This was obvious error.

"This case presents the narrow question of what Congress did, not what it could do." *Federal Trade Commission* v. *Runte*, 312 U. S. 249, 355.

7. (Pages 34-39). The objective of Congress in passing the Federal Power Act was to regulate that part of the "business" of transmission and sale of electric energy which involved such transmission and sale at wholesale in interstate commerce. In view of this stated objective the definition of public utility must be related to ordinary commercial relationships between the parties and not to a technical or theoretical discussion of the physical phenomena of electric current. Judged by the standards of commercial relationships, there is no foundation for the finding that Jersey Central is a public utility within the definition of Section 201(e) of the Federal Power Act since Jersey Central's participation in the interstate transmission of electric energy, if any, terminated with delivery of energy to Public Service in the State of New Jersey, and there was no intent on the part of Jersey Central to transmit electric energy to Staten Island Company in New York State.

8. (Pages 39-40). The extent to which Federal regulation will encroach upon State regulation, if the judgment below is sustained, is strikingly illustrated by the opinion below. The opinion states that not only are Jersey Central, Public Service and Staten Island so connected as to permit energy to flow from one system to another, but that these systems, in turn, are connected with "other electric transmission systems covering the Southern part of New Jersey, the Southeastern part of Pennsylvania, the Northeastern part of Maryland (and) Delaware" and with other "interconnected public utilities in Pennsylvania and New York." The opinion below goes on to say:

> "Since these various electric utilities systems are interconnected, it is obvious that there will be some incidental or slop-over current passing through the various system connections including the bus-bar at the Mechanic Street Substation which comprise the connections between Jersey Central and Public Service on the one hand and Public Service and the Staten Island Company on the other." (R. 1118)

This slop-over movement the court below holds to be within the application of the Act, saying, in part:

> "Once the circuit between the Jersey Central generating plant and the Staten Island Company was closed, *inevitably* electricity flowed from Jersey Central to the Staten Island Company. That result was * * * *unavoidable*. The fact that Jersey Central sold this electricity to Public Service rather than to Staten Island does not serve to put the flow out of commerce. * * * It is electricity which is transmitted from New Jersey to New York. *It follows that Jersey Central is a public utility within the meaning of Section 201(e) of the Act.*" (R. 1133) (Italics supplied).

This court will take judicial notice that interconnection between electric utilities throughout the country is general, and that the effect of the judgment below, if sustained, will be to bring under Federal regulation practically all the electric utilities of the several states, in violation of the declared intent of Congress.

9. (Pages 40-42): The court below erred in holding that subjection of the Jersey Central to the regulation of the Federal Power Commission will not impair the jurisdiction of the State commission. "It is of the essence of this (Federal) power that where it exists it dominates." *Shreveport Case*, 234 U. S. 342, 350, *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 428.

The construction placed upon the Act by the court below not only threatens displacement of State jurisdiction over the purchase of securities of intrastate electric utilities, under circumstances such as are shown here, but, of vastly more importance, it threatens also the jurisdiction of every State commission over every sale of power by one utility to another utility for distribution in intrastate commerce within the State of sale, when any part of energy so sold happens to be permitted by any person thereafter controlling the same to flow into another State for consumption.

ARGUMENT.

By the Enactment of the Federal Power Act Congress Intended to Supplement State Power, Not to Supplant It.

Argument in this brief will be confined to the single point that Congress intended so to limit the jurisdiction granted to the Federal Commission as to confine such jurisdiction to utilities engaged in the business of the interstate transmission and sale of electric energy at wholesale, in such manner as to be beyond the reach of regulation by the States; and that consequently the Jersey Central is not within the jurisdiction of that Commission.

To reach a correct construction of the Federal Power Act, the purpose which Congress intended when it enacted the Act must be kept in view. The legislative history of the Act makes that purpose completely clear and negatives emphatically a construction which would so extend the jurisdiction of the Federal Commission as to subject the Jersey

Central and other electric utilities of the same class, to the regulation of that Commission.

The purpose of Congress was to make complete the regulation of electric utilities. It did not design to do this by the displacement of State authority. Its only purpose was to occupy those portions of the regulatory field which this court had held were beyond the reach of State authority, so that the public might have the benefit of regulation as complete as if a single government exercised all regulatory power over the utilities of the country.

There is no difficulty in understanding the statute, if the situation will be considered under which Congress acted. That situation may be briefly stated:

The States had undertaken the complete regulation of public utility operations within their respective boundaries,—both those operations which were wholly confined within such boundaries, and those which were "in interstate commerce," because they were operations set in motion in one state and terminated in another.

Public utilities resisted regulation, seeking to use the Constitution of the United States as a shield. With respect to operations wholly confined to a single State, this attempt to defeat State regulation failed. *Munn* v. *Illinois*, 94 U. S. 113. In the field of transportation, with respect to operations beginning in one State and ending in another, the attempt to defeat State regulation was attended with a degree of success. In *Wabash Etc. Ry. Co.* v. *Illinois*, 118 U. S. 557, this court held that rates charged for the interstate transportation of freight by rail were not within the reach of State regulation.

The precedent established in *Wabash Etc. Ry. Co.* v. *Illinois*, as to railroad rate regulation, was sought to be used to prevent regulation of interstate utility rates, and with a considerable degree of success, falling very far short, however, of complete success.

In *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 23, the gas company involved sought to defeat

regulation by the State of New York of the price of gas sold to the public in Buffalo upon the ground that the gas was produced in Pennsylvania and was imported from that State and sold in Buffalo in interstate commerce. This court held that while the commerce in such case was, strictly speaking, in interstate commerce, and thus within the reach of Congress, if and when Congress should choose to exercise its regulatory power, yet the sales to the public at Buffalo were local in character, and subject to State regulation, till Congress should elect to supplant State regulation with Federal regulation.

In *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, the Gas Company involved again resisted state regulation upon the ground that the commerce sought to be regulated was interstate and beyond the reach of State power. The rule in *Wabash Etc. Ry. Co.* v. *Illinois* was again invoked. This time the Company succeeded. The rates sought to be regulated were wholesale rates, applicable to sales of gas to distributing companies by another company, which imported the gas from another State. Sales of that character, this court held, were not local, but national in character, and beyond the reach of the State power. Regulation of such sales, the court said, if to be imposed, must be imposed by the Congress.

The two cases just mentioned involved sales of natural gas, but the rules laid down in those cases were held equally applicable to sales of electric energy. In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, the court was asked to hold invalid an order of the Public Utilities Commission of Rhode Island, regulating the price of electric energy generated in Massachusetts and transmitted by the generating company for sale directly to a distributing company at the Massachusetts State line. In that case, this court reviewed the applicable decisions, and held that the sale of electric energy there involved was national in character, and fell within the rule laid down in *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298.

In that decision, the court made clear that two classes of interstate sales were recognized, viz. (1) sales directly to the public, as in the *Pennsylvania Gas Company Case*, 252 U. S. 23, which were considered local in character, and in the absence of Federal regulation, subject to State regulation; and (2) sales at wholesale by one utility to another for re-sale. These latter sales were considered national, and not within the reach of State regulation. As to this second class of interstate sales, there could be no regulation till Congress should supply the same.

Generation of electric energy, however, had been held to be local in character and subject to State regulation. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165.

This situation, under which the transmission and sale of electric energy at wholesale, by one utility to another utility, in interstate commerce, escaped regulation, called for a remedy. The Federal Power Act was designed as the remedy.

The enactment of the statute was urged both by the Federal Power Commission and by the State commissions, as will be shown in the following brief review of the legislative history of the Act.

The Legislative History of the Federal Power Act Makes Plain the Intent of the Congress Not to Displace State Authority Over Any Utility Actually Subject to State Regulation.

Supporting the enactment of the proposed statute, at the first hearing thereon before the House Committee, Commissioner Seavey, the Chairman of the Federal Power Commission, said:

> "The new Title II of this Act is designed to secure coordination on a regional scale of the nation's power resources and to fill the gap in the present state regulation of electric utilities. *It is conceived entirely as a supplement to, and not as a substitution for State Regulation*" (Hearings on H. R. 5423 before House Com-

mittee on Interstate and Foreign Commerce, 74th Congress, 1st Session, p. 384. Italics Supplied.)

The General Solicitor of the National Association of Railroad and Utilities Commissioners, also urging the enactment of legislation, said:

> "I appear by direction of the president and of the executive committee of our association to present certain amendments which we ask to have made to the pending bill. * * *
>
> The second and third sections of the bill provide for regulation by the Federal Government of wholesale transactions in electric power and in natural gas. These are transactions which the United States Supreme Court has held are beyond the reach of the States under the Constitution. The States have long regulated the rates charged by the local distributing companies to consumers; but they cannot reach the interstate producer supplying the distributing company.
>
> The rates fixed in these wholesale transactions necessarily affect the rates to consumers. They are wholly unregulated. The State commissioners favor the filling of this gap by well considered legislation enacted by Congress, which is the only body that can legislate.
>
> In the enactment of this legislation, however, we ask the Congress not to break down the regulation of local service rates, which is now provided under the State laws. This bill in its present form would do this to a very large extent.
>
> The holding company section goes beyond the regulation of holding companies and imposes restrictions and regulations upon operating utilities, the operations of many of which are wholly confined to the several States, within which they operate. The other two sections of the bill the State commissions believe also go beyond the necessities of the situation and would result in transferring from the local State commissions to Federal commissions control of many matters which are now regulated locally and should continue to be so regulated.
>
> The amendments which we have presented have been drawn with the purpose of safeguarding the regulatory

powers of the States." (Hearing on H. R. 5423 before House Committee on Interstate and Foreign Commerce, 74th Congress, 1st Session, Pages 1620 and 1622.)

As the bill stood at that time, Section 201 (a) provided in part as follows:

> "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the *production* of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale and or *production* of energy by any means *and over all facilities connected therewith as parts of a system of power transmission situated in more than one State*, except facilities for the retail distribution of electric energy. . . . Every person who owns or operates facilities subject to the jurisdiction of the commission under this title and every person who controls, directly or indirectly, any such person shall be subject to the provisions of this title and title III. The term 'public utility' when used in this title and title III means any person who owns or operates such facilities." (Italics supplied.)

The broad sweep of these provisions gave concern to state authorities, lest the jurisdiction of the State commissions should be disturbed within the field of local operations, intrastate and interstate, which this court had held could be occupied by State authority, in the absence of Federal regulation of such local interstate activities. Protecting amendments were accordingly urged on behalf of the States.

The Congress determined to limit the jurisdiction to be granted to the Federal Commission to those interstate activities of electric utilities which could not be reached by State authority. This determination was made clear by express language, both in the bill itself and in the language of Congressional committee reports which accompanied the bill.

Transformation of the bill from the form in which it was first offered began in the Senate and was completed in the House. In each branch of the Congress, changes were made designed to make certain that the conception of the bill, stated by Chairman Seavey, as a supplement to and not as a substitution for state regulation, should certainly be secured, leaving state regulation undisturbed as to activities of electric utilities which were subject to State regulation.

The Senate first acted upon the bill. Section 201(a) was re-cast by the Senate Committee into subsections (a) and (b). The new subsection (a) declared "the business of generating, transmitting, and selling" electric energy to be "affected with a public interest." Said subsection (a) further declared that "Federal regulation of that part of said business which consists of the transmission and sale of electric energy in interstate commerce and the generation of electric energy for such transmission and sale is necessary in the public interest."

Such Federal regulation, however, was considered to be necessary only as to matters which the States could not regulate, and the intent to provide Federal regulation only as to those matters was explicitly declared in said subsection (a) as follows:

> "It is further declared to be the policy of Congress to extend Federal regulation *to those matters which cannot be regulated by the States*, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and *not to impair or diminish the powers of any State commission*." (Italics supplied.)

Subsection (b) of said Section 201 as re-cast by the Senate Committee provided as follows:

> "(b) The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce and to the production of electric energy for

such transmission or sale, but shall not apply to the retail sale of such energy in local distribution. The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following."

The Senate Committee in re-casting the bill thus retained, in substance, the sweeping provisions of the original bill, but undertook to limit their reach by the declaration of the Congressional purpose "not to impair or diminish the power of any State commission," and by excluding from the jurisdiction of the Federal Power Commission "the retail sale of such (electric) energy in local distribution" and by excluding from such jurisdiction "facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter." Other changes were also made, in other parts of the bill, designed for the preservation of State regulatory powers.

In reporting the revised bill to the Senate, the Senate Committee said:

> "Subsection (a) * * * declares the *policy of Congress to extend that regulation to those matters which cannot be regulated by the States* and to assist the States in the exercise of their regulatory powers, but *not to impair or diminish the powers of any State commission.* (Italics supplied.)
>
> "Subsection (b) defines the scope of this part of the act and the jurisdiction of the Commission. * * * This subsection leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State. In *Pennsylvania Gas Co.* v.

Public Service Commission (252 U. S. 23), the Supreme Court held that such rates may be regulated by the States in the absence of Federal legislation. The present bill carefully refrains from asserting Federal jurisdiction over these rates. The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 U. S. 83), to be beyond the reach of the States." (Senate Report No. 621, 74th Congress, 1st Session.)

The redrafted bill, as presented by the Committee, was passed by the Senate. The House, however, was not satisfied that the jurisdiction of the Federal Commission was restricted with sufficient certainty for the adequate protection of State powers. The entire Senate bill was struck out by amendment, and a redraft of the same was substituted. In the redraft, subsections 201 (a) and (b) were as follows:

"Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction over facilities used for generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intra-

state commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

It will be seen that the changes made completely eliminated from the jurisdiction of the Federal Commission "generation of electric energy" and explicitly denied to it "jurisdiction over facilities used for generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

In presenting this amended bill to the House, the House Committee in its report said:

> "The new Parts (II and III) are designed to meet the situation which has been created by the recent rapid growth of electric utilities along interstate lines. * * * Under the decision of the Supreme Court of the *United States in Public Utilities Commission* v. *Attleboro Steam and E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transmissions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.
>
> Part II gives control over security issues of interstate operating companies in cases where no State commission has control and over the consolidation, purchase, and sale of interstate operating properties. * * *.
>
> *The bill takes no authority from State commissions* and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. * * * *Probably, no bill in recent years has so recognized the responsibilities of the State regulatory commissions as does title II of this bill.*" (House Report No. 1318, 74th Congress, 1st Session. Italics supplied.)

The bill went to a conference committee where Sections 201 (a) and (b) took their present form. The House lan-

guage of these subsections was preserved save for the insertion in Section (b) of the words "except as specifically provided in this Part and the Part next following," and for a corresponding change in subsection (a).

The purpose of the exception is obvious. The bill excluded generation and facilities used for generation from the Commission's jurisdiction. Exclusion to that extent was designed, but in Sections 207, 301 (a), and 311, the bill proposed to grant specific jurisdiction to the Commission respecting matters indirectly relating to generation. Also in Section 202(c) and (d) it was proposed to provide that in time of war or of national emergency the Commission should have power "to require by order such temporary connection of facilities and such generation * * * of electric energy" as the Commission should find requisite in the public interest. By these several sections, the Commission was to be specifically enabled to exercise jurisdiction for certain purposes as respects generation, under Parts II and III. It was not intended that such proposed jurisdiction should be affected by the exception incorporated in Section 201(b). Accordingly, Congress inserted the exception within the exception. Such insertion, however, was merely to prevent the jurisdiction specifically granted as aforesaid, from being brought in question. It was not intended to render the limiting language in subsections 201(a) and (b) of no effect. That language was inserted to accomplish a definite congressional purpose, and that purpose was made clear by the language in the Act, and by the language of the Committee Reports which presented the legislation to Congress.

This is the legislative history of the Federal Power Act, in the light of which the various provisions of that Act will be construed.

The Federal Power Act Can Not Be So Construed As To Extend to the Jersey Central Without Displacing State Authority As To a Large Class of Public Utilities In Disregard of the Plain Purpose of the Act, As Explicitly Declared Therein.

The purpose of Congress not to extend Federal regulation over matters which could be effectively regulated by the States was made plain by the reports of the Committees representing the two Houses of Congress, in language which we have hereinbefore quoted, and likewise by the language of the Act itself, which explicitly declared that purpose to be that the regulation provided should "extend only to those matters which are not subject to regulation by the States." It is in the light of that purpose that every provision of the Act must be construed, if the will of Congress is to be given effect.

In this case it is beyond question that prior to the enactment of the Federal Power Act the Jersey Central was subject to regulation, in all of its activities, by the State of New Jersey.

The generation of electric energy for the purpose of instantaneous transmission to another State has been held subject to State control in *Utah Power & Light Co.* v. *Pfost*, 286, U. S. 167. In that case this court differentiated generation from instantaneous transmission to a point outside of the state, saying:

> "We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing, and to that situation we must apply, as controlling the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the State from exercising exclusive control over the manufacture.
>
> * * *
>
> Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities not in one only. So far as it produces elec-

trical energy in Idaho, its business is purely intrastate, *subject to state* taxation and *control*. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution." (286 U. S. 181, 182. Italics supplied.)

In this case the Jersey Central did not generate electric energy with the design of selling the same in interstate commerce. All of its activities of transmission and selling were intrastate, both as respects sales to consumers, and as respects its exchange transactions with Public Service. They were activities subject to State regulation, and were actually being regulated by the agency created for that purpose by the State. None of these activities was within the category of "matters which are not subject to regulation by the States." It was, therefore, the declared purpose of the Congress that the regulation of the Federal Power Commission should not extend to Jersey Central.

The Federal Power Commission, however, asserts jurisdiction upon the ground that Jersey Central owns a fraction of a mile of transmission line which is used in the transmission of electric energy to Public Service, some part of which energy, under the contractual interchange arrangements between Public Service and Staten Island, flows to Staten Island in interstate commerce. Because the flow of such electric energy from the power plant of Jersey Central over this facility of that company, and through the plant of the Public Service, to its interstate destination, is instantaneous, the Commission holds the entire movement to be "in interstate commerce," and hence the Jersey Central, by reason of its ownership of a facility used in such transmission, to be a public utility subject to its jurisdiction.

The Commission depends upon the language of Section 201 (b), which declares that the provisions of the Act

"shall apply to the transmission of such electric energy in interstate commerce, and to the sale of electric energy at wholesale in interstate commerce" and that the Commission "shall have jurisdiction over *all* facilities for such transmission or sale * * *." It is said that this language literally applies to the Jersey Central, and brings it within the jurisdiction of the Federal Commission. The Court below so ruled.

To the extent that this ruling subjects the Jersey Central to Federal Power Commission regulation over any of its activities, all of which were subject to State regulation before the enactment of the Federal Power Act, it defeats the purpose of the Congress to extend such Federal regulation only to matters not before subject to State regulation. The effect of it will be to impair, diminish or displace State regulatory power as to a large class of electric utilities heretofore subject to exclusive state regulation.

Section 201(b) and Every Other Part of the Act Must Be Construed in the Light of the Congressional Declaration of Purpose in Section 201(a).

The words "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States" were inserted in Section 201(a) to accomplish a definite Congressional purpose. They may not properly be disregarded.

No contention is here made that such construction should be given to those words as to exclude from the jurisdiction of the Federal Commission every matter whatsoever connected with the operation of electric utilities which could be reached by State regulation. Those words are designed as a guide in the construction of the Act, so that the application of the same may accomplish the indicated purpose.

The matters intended to be held excluded from the scope of the Federal regulation provided were matters of transmission and sale, held to be affected with a public interest, but local in their nature, and subject to State regulation,

and hence considered by Congress as not necessary to be brought under Federal regulation. The plain purpose of the Congress was to make the Act applicable only as to "that *part* of such business," of transmitting and selling, as was not already subject to regulation by the states.

Undeniably there are other matters, not within the category of matters of transmission or sale, over which the Congress considered it desirable to give the Federal Commission jurisdiction, when that Commission should be dealing with public utilities engaged in interstate transmission and sale at wholesale, even though such other matters might be reached by State regulation. Examples are securities issues, which the Federal Commission may regulate under Section 204(a), subject to the limitations of Section 204(f), and accounts, which the Federal Commission may regulate under Section 301(a) (without relieving utilities regulated from obedience to State regulation, which is expressly protected by the proviso of said Section 301 (a)).

It will be noted that Section 201(b) completely excludes from the application of the statute every sale of electric energy except a "sale at wholesale in interstate commerce." In this case no sale of energy by Jersey Central "at wholesale in interstate commerce," has been shown, of the character which Congress declared necessary to be regulated, and designed to bring under Federal regulation.

The disposition of energy by Jersey Central to Public Service was a disposition in intrastate commerce. If that transaction can be held a "sale" it was a sale in intrastate commerce, and as such was expressly excluded from the application of the Act.

The transaction was intrastate because the production of electric energy was purely local and subject to State control, as this court held in *Utah Light and Power Co.* v. *Pfost*, 286 U. S. 165, 182. Jersey Central had a right to dispose of energy locally produced in local intrastate commerce. It did so dispose of it, transmitting the same over the ⅞ mile of transmission line to the point of delivery to Public Service. That is the transmission relied upon by the Federal

Commission, as bringing the facility, and the utility owning the same, under its jurisdiction. Such transmission, however, is "in local distribution," and "in intrastate commerce"; and facilities used only in such transmission are doubly excluded from the Federal Commission's jurisdiction, by the express language of said Section 201(b).

To hold that this disposition of energy produced by Jersey Central was not in intrastate commerce, by reason of the supposed instantaneous movement of some of that energy from Jersey Central generators to an ultimate destination in New York state, is the equivalent of holding that no sale of electric energy can be made in intrastate commerce if any utility or person, into whose control any of the same shall come, shall so use the same as to permit any part thereof to flow across a state line for consumption in another state. This is not a practical conception of the effect of the Commerce Clause of the Federal Constitution.

If the Exchange Transactions Between Jersey Central and Public Service Can Be Held to be "in Interstate Commerce," They Are Local in Character and Not Within the Application of the Federal Power Act.

If the exchange transactions between Jersey Central and Public Service, through which energy is delivered to Public Service over the 7/8 mile of transmission line here involved, can be held so connected with interstate commerce as to be "in interstate commerce", and hence within the reach of Federal regulation, whenever Congress shall provide such regulation, nevertheless, they are local in character.

Such exchange transactions are incident to the intrastate commerce in which Jersey Central is engaged. They affect the interest of consumers in other states, if at all, only indirectly and so slightly as to be within the rule of the *Pennsylvania Gas Case*, 252 U. S. 23, 29. They do not fall within the reasoning of the *Attleboro Case*, 273 U. S. 83, 89-90. They are not national in character, requiring regulation, if at all, by the Federal government, because subjecting consumers in one state to the danger of burdens imposed for the benefit of consumers in another state.

Not only are transactions such as these not necessary to be regulated by the Federal Government in the interest of interstate consumers, but such Federal regulation is plainly not desirable. To the extent that Federal regulation burdens utilities, and might thus act as a deterrent upon the effecting of inter-connections by intrastate utilities, for the accomplishment of economies in operation and of improvements in service, Federal regulation of such transactions would be inimical to the public interest, for reasons aside from its operation as an impediment to State regulation.

Such exchange transactions are incident to the local business of Jersey Central. In the absence of action of Congress preventing it, they are subject to regulation by New Jersey. They are not within the class of interstate wholesale transactions covered by the *Attleboro Case*. Facilities used in the transmission of energy for delivery to Public Service accordingly are facilities used "in local distribution", within the intent of Congress, and are specifically exempt from Federal regulation by Section 201(b), regardless of whether the transmission be considered intrastate or interstate.

This court has very clearly held that in the construction of a statute the purpose of Congress must be given effect, even though it may be necessary to disregard the grammatical meaning of words or provisions considered in isolation from other parts of the statute under construction. See the opinion of Mr. Justice Brandeis, *Tex. & P. R. Co.* v. *Gulf Col. and S. F. Ry. Co.*, 270 U. S. 266, 277, and of Mr. Justice Reed in *American Trucking Association* v. *U. S.*, 310, U. S. 534, 542.

In this case, however, there is no occasion to deny its natural import to any of the language of Section 201 (a) and (b) in order that the Jersey Central shall be left wholly outside the jurisdiction of the Federal Commission. It is necessary only to give a construction to the words "all facilities for *such* transmission or sale of elec-

tric energy" in Section 201 (b) which is consistent with other portions of the Act. Those words relate back to the words "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," in the preceding sentence. Those words of the preceding sentence have a limited meaning. They connote not every transmission and sale, but only *those "which are not subject to regulation by the states."* That is the construction directed by the Act. They therefore exclude sales within a state in intrastate or local interstate commerce, either at wholesale or retail, and they exclude transmission within a state for any such sale, regardless of any disposition of the electric energy after transmission by the selling company, and after that company has parted with title to the same.

Jersey Central neither owns nor operates any facility, "for *such* transmission or sale" as the Act was intended to apply to, and hence Jersey does not fall within the definition of a public utility, as contained in Section 201 (e).

It is not here a question whether such movement of electric energy as takes place between Jersey Central and Staten Island constitutes interstate commerce, which is within the reach of Congress. It is a question, rather, whether it is a movement of that character which Congress intended to take under Federal regulation by the Act.

A construction which brings the Jersey Central under the regulation of the Federal Commission will bring under such regulation every electric utility upon the lines of which any electric energy flows, which thereafter, in any manner, reaches another State for ultimate consumption. Such regulation will apply to matters which are subject to State regulation, and will operate to exclude or encroach upon State regulation, as will be more fully hereinafter pointed out.

The words "transmitted in interstate commerce", as used in the definition in Section 201(e), cannot consistently with the plain purpose of Congress be construed to extend

to every transmission of electric energy generated in one State and consumed in another. The definition containing those words, like every other provision of the Act, must be construed in the light of that declared purpose, so to restrict the application of the provisions of the Act as to cover only "those matters which are not subject to regulation by the states."

In the light of that declaration, and of the accompanying definition in Section 201(d), Section 201(e) plainly means only that electric energy shall be held to be "transmitted in interstate commerce" for the purposes of the Act, when it is transmitted for a sale *of the character to which the Act applies*, and for *consumption outside the State where it is generated*.

That construction will bring the definitions in the Act into complete harmony with each other, and will effectuate the purpose of Congress, which is, or should be, the only object of construction. *American Trucking Association* v. *United States*, 310 U. S. 523, 542.

The Court Below Erred In Construing the Federal Power Act as Applicable to All Transmissions in Interstate Commerce.

The court below cited as analogous cases, *Eureka Pipe Line Company* v. *Hallanan*, 257 U. S. 265 and *United Fuel Gas Company* v. *Hallanan*, 257 U. S. 277—cases which merely support the proposition that natural gas moving, as in those cases, in an uninterrupted flow from the point of production in one state to its ultimate destination in another state is in interstate commerce from the time the movement begins till it reaches its destination, although title thereto may change within the State within which the gas was produced. Resting upon the assumed authority of those cases, the court below said:

> "Once electricity flowed from the Jersey Central generating plant to the Staten Island Company, com-

> mercial transactions between the three companies under their respective contractual relations and arrangements followed. This was interstate commerce within the meaning of the Commerce Clause." (R. 1133)

The fact that there is at times and in some quantity a continuous movement of electric energy from Jersey Central to Staten Island was thus treated as conclusively establishing the status of Jersey Central as a public utility within the definition of Section 201(e). The court thus entertained the assumption that the Congress, by the enactment of the Federal Power Act, designed to make the transmission of energy in interstate commerce determinative of the jurisdiction of the Commission, notwithstanding the declaration of Congress in Section 201(a), that regulation under the Act should "extend only to those matters which are not subject to regulation by the states."

The court below did review the legislative history of the Federal Power Act, to which we have adverted, which history was pressed upon the attention of the court by the Petitioner, and in particular noted the declaration in Section 201(a), just quoted, but the court waived such history and declaration aside because of the definition in Section 201(e), saying:

> "But the contentions of the petitioners in respect to the effect of the legislative history of Part II lose much of their potency when we contemplate the provisions of Section 201(e) which states that electricity shall be held to be transmitted in interstate commerce if transmitted from a state and consumed outside that state. Section 201(e) of the Act was in the original bill submitted to the Senate and the House of Representatives and came into the law substantially without change. That section fits well into the law as laid down by the decision of the Supreme Court in Public Utilities Comm. v. Attleboro Steam and Electric Co., 273 U. S. 83, and takes away, we think, the force of the argument of unconstitutionality made on behalf of the petitioners, at least insofar as the application of Section 201 of the Act to Jersey Central (fol. 1141) is concerned.

> The provisions of Part II were intended by Congress to be applied only to electrical energy transmitted in interstate commerce and in this field there can be no doubt that Congress posses the constitutional right to legislate. See Northern Securities Company v. United States, 193 U. S. 197." (R. 1132).

What the court below did, accordingly, was to permit the words of Section 201(c), taken literally, to deprive the language of Section 201(a), which declares the intent of Congress, of its effect, instead of construing Section 201(c) in conformity with that language, as Congress intended every provision in the Act should be construed.

The fact that the movements of energy, of the character here involved, are in interstate commerce, and thus fall within the scope of the Constitutional power of Congress, under the Commerce Clause, was erroneously considered by the court below as establishing the jurisdiction of the Federal Commission. The question here, however, is not one of Congressional power, but of Congressional intent. To use words from the opinion of Mr. Justice Frankfurter in *Federal Trade Commission* v. *Bunte*, 312, U. S. 249, 355: "This case presents the narrow question of what Congress did, not what it could do."

Congress saw fit to refrain from providing Federal regulation for any matters of transmission or sale except those only which, prior to the time of the enactment of the Federal Power Act, were not subject to state regulation.

Jersey Central Is Not Engaged In the Business of Transmitting and Selling Electric Energy at Wholesale In Interstate Commerce.

Congress limited the jurisdiction of the Federal Power Commission to "those matters not subject to regulation by the states and announced its purpose to regulate the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." From Section 201(a) it is clear that the statute was specific

ally designed to fill the gap in the regulation of electric utilities pointed out in the decision of this court in *Public Utilities Commission* v. *Attleboro Steam and Electric Company*, 273 U. S. 83. In the *Attleboro Case*, the Rhode Island regulatory commission attempted to fix rates for electric energy generated in Rhode Island to be consumed in Massachusetts. The current was to be delivered at the state line, although it was within the knowledge of both parties, and covered by agreement, that the current was for use in Massachusetts and was to be metered in the State of Massachusetts. In that case the court properly construed the nature of the transaction in the following language.

> "It is conceded, rightly, that the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the State line. 'The transmission of electric current from one State to another, like that of gas, is interstate commerce * * *' and its essential character is not affected by a passing of custody and title at the state boundary not arresting the continuous transmission to the intended destination."

It will be noted that the transmission was by the selling company, delivered at the state line for an "intended destination." It was this decision which gave impetus to the proposal for establishment of a federal commission to regulate the price of electric energy sold at wholesale in interstate commerce. The facts in the instant case entirely negative any intention on the part of Congress to bring within the jurisdiction of the federal commission transactions such as the sale by Jersey Central of electric energy generated in New Jersey to Public Service Company, delivered and metered in New Jersey. Clearly there was foundation for the holding in the *Attleboro Case* that regulation of the rate charged by the Rhode Island company for the electric energy sold for delivery and consumption in Massachusetts was beyond the power of the state commis-

sion. It is equally clear that the transaction here is one which may be distinguished from the language in the *Attleboro Case* as one properly to be regulated by the state. The business of Jersey Central Company is the generation and selling of electric energy in the State of New Jersey. Its arrangements with Public Service Company are designed to effect economy of operation for both parties to such arrangements. It has been noted that the Federal Power Commission rests its entire case upon the proposition that Jersey Central owns facilities used in the transmission of electric energy in interstate commerce and the court rests its decision exclusively on a literal and technical interpretation of Section 201(c) divorced from other provisions of the Act, particularly the declared intent of Congress. In the light of the specific declaration of Congress that it only found necessary regulation of "that part of the business of transmitting and selling electric energy" which constituted the transmission and sale of such energy at wholesale in interstate commerce, the words of Mr. Justice Holmes in *Superior Oil Company* v. *Mississippi*, 280 U. S. 190, are particularly applicable:

> "But here the gasoline (electric energy) was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself, the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the state line. A distinction has been taken between sales made with a view to a certain result, and those made simply with indifferent knowledge that the buyer contemplates that result."

This court has held that "the process of generation is as essentially local as though electrical energy were a physical thing" (*Utah Power and Light Co.* v. *Pfost*, 282 U. S. 165) which places electric energy in the hands of a purchaser in no different status from coal, oil, or some other source

of energy which the purchaser may use as he sees fit. The peculiar characteristic of electric energy which involves the assumption that there is no transmission except when there is a load on the line and that transmission is instantaneous and continuous from the point of generation to the point of ultimate use, such as the motor or electric light, should not be used as the foundation for setting apart transactions involving electric energy from transactions in other commodities or substances which are subjects of intrastate commerce but may also move in interstate commerce.

Transmission of electric energy as referred to in the Federal Power Act must be viewed in the light of ordinary commercial relationships in the business world since it is the "business" of transmission and sale of electric energy which congress undertook to regulate. The decisions of this Court dealing with shipments of commodities by railroads are directly in point in determining whether a particular transmission of electric energy is in interstate commerce. It has been established by this court in a long line of cases that before a shipment is in interstate commerce there must be (1) "through and continuous movement from one state to another" *and* (2) "at the time that the movement is started, *an intention that the shipment shall be interstate* or foreign and this intention must be carried out. In a word, there must be the intent and the event." (*Oregon Washington R. & Nav. Co.* v. *Strauss & Co.*, 73 Fed. (2d) 912, 914. Certiorari denied 294 U. S. 723.) The record in this case is devoid of evidence establishing an intention on the part of Jersey Central to transmit electric energy in interstate commerce. The evidence is all to the contrary.

It is admitted by the court below that there is no way to determine how much electric energy generated by Jersey Central flowed from Public Service Company to Staten Island Company. By a process of deduction the court reached the conclusion that "it is certain that some did go to the Staten Island Company". It is also certain that if any energy generated by Jersey Central actually flowed to the

Staten Island Company, it was at the instance of Public Service and a matter wholly beyond the control of, and of no consequence to, the Jersey Central Company. It constituted no part of the "business" of Jersey Central Company. Finally there is no showing of any affiliation between the Jersey Central and Public Service Company and Staten Island Company which would indicate a design to defeat the jurisdiction of the Federal Power Commission through contractural arrangements among corporations created for this purpose.

Jersey Central is a New Jersey corporation doing business exclusively in that state. All its rates, practices, and regulations, etc., including its security issues are under regulation by the State of New Jersey. The contract covering arrangements with Public Service is bona fide, and is concluded as to Jersey Central with transmission over its line to a connection with Public Service at a point in New Jersey. Public Service may do as it chooses with the energy so received. There is no contract between Jersey Central and Staten Island, nor does any agreement between Public Service and Staten Island Company contemplate delivery of power to Staten Island which is generated by Jersey Central. The business in which Jersey Central is engaged is not one which Congress, in the Federal Power Act, found it necessary for the Federal government to regulate. Its business is fully subject to regulation by the state of New Jersey. The public interest would not be served by the superposition of federal regulatory authority on the completely adequate authority of the state over the business of Jersey Central.

To hold that Jersey Central should be subject to regulation by the Federal Power Commission is to completely ignore the legislative history of the Federal Power Act and the specific declaration of Congress in Section 201(a).

The Opinion of the Court Below Well Illustrates the Extent To Which State Jurisdiction Will Be Affected, If the Commission's Order Shall Be Sustained.

The extent to which Federal regulation will encroach upon State regulation, if the judgment below is sustained, is well illustrated by the opinion of the court below. The opinion points out that not only are Jersey Central, Public Service, and Staten Island so connected as to permit energy to flow from one system to another, but that the transmission systems of those companies in turn are connected "with other electric transmission systems covering the Southern part of New Jersey, the Southeastern part of Pennsylvania, the Northeastern part of Maryland (and) Delaware," and that additional reserve energy is "procurable from interconnected public utilities in Pennsylvania and New York." The opinion goes on to say:

> "Since these various electric utilities systems are interconnected, it is obvious that there will be some incidental or slop-over current passing through the various system connections including the bus-bar at the Mechanic Street Substation which comprise the connections between Jersey Central and Public Service on the one hand and Public Service and the Staten Island Company on the other." (R. 1118)

This slop-over movement of energy between connected systems is inevitable when the circuit is closed which causes the connection. The legal effect of such inevitable movement, when energy thus passes over a state line, according to the opinion below, is to make *all of the connected companies, over the lines of which the energy moves, public utilities subject to the Federal Commission.* Discussing the movement from Jersey Central, the court below said:

> "Once the circuit between the Jersey Central generating plant and the Staten Island Company was closed, *inevitably* electricity flowed from Jersey Central to the Staten Island Company. That result was * * * *unavoidable.* The fact that Jersey Central sold this

> electricity to Public Service rather than to Staten Island does not serve to put the flow out of commerce. . . . It is electricity which is transmitted from New Jersey to New York. *It follows that Jersey Central is a public utility within the meaning of Section 201(e) of the Act.*" (R. 1133. Italics supplied.)

It will be perceived that the judgment of the court below clearly means that these connected utilities, because of the "inevitable" movement of electric energy from system to system, and, in some measure, across state lines, are all subject to regulation by the Federal Commission.

The court will take judicial notice of the fact that the same interconnection of electric utilities is general throughout the country, and that the effect of the construction thus placed upon the Federal Power Act by the court below, if sustained, will be to bring under the regulation of the Federal Commission practically all of the public utilities of the several states.

We submit that such a construction does violence to the plainly stated purpose of the Congress.

Subjection of the Jersey Central to the Jurisdiction of the Federal Power Commission Will Inevitably Operate As an Encroachment Upon State Jurisdiction.

Recognizing that the declaration of Congress in Section 201 (a), limiting the jurisdiction conferred by the Act, may not be utterly disregarded, the court below undertook to construe the Act so as to give to the Federal Commission jurisdiction over Jersey Central without encroachment upon the jurisdiction of the State commissions. In its opinion the court said:

> "As we have indicated it was the intention of Congress in passing Part II of the Act to extend federal regulation to the transmission of electricity in interstate commerce. But by Section 201(a) Congress made it plain that such regulation was to extend only to those matters which were not subject to regulation by the

states. The petitioners point out that the transfer of stock with which we are concerned was approved by the Board of Public Utility Commissioners of New Jersey in the exercise of the authority granted to the Commissioners by the law of New Jersey, R. S. 1937, 48:2-13.

The sale of the Jersey Central stock to Jersey Power properly was subject to regulation by the State of New Jersey because Jersey Central was engaged in intrastate commerce in that it supplied electricity to local consumers (fol. 1143) within the State of New Jersey. The sale was subject to the jurisdiction of the Federal Power Commission because Jersey Central is a public utility within the meaning of Section 201(e). * * * The authority of the Board of Public Utility Commissioners of New Jersey must be deemed to be paramount in those matters which may affect the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may affect the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may affect the transmission of electric energy in interstate commerce. We cannot presume a conflict between the two regulatory bodies upon the issue of whether or not Jersey Power should have bought the stock of Jersey Central. No conflict is shown upon the present record and none may ever come into existence." (R. 1134)

As Mr. Justice Hughes said, in the *Shreveport Case*, 234 U. S. 342, 350, "It is of the essence of this power (of the Federal Government) that where it exists it dominates." See also the opinion of Mr. Justice Reed in *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 428.

The sale of Jersey Central stock to the New Jersey Power and Light Company was subject to regulation by the New Jersey Commission, unless State regulation was displaced by the enactment of the Federal Power Act. The New Jersey Commission has sanctioned the purchase. The Federal Commission has held the acquisition, already made, with such State Commission approval, unlawful, because not

approved by it. If this decision of the Federal Commission shall be sustained, and the acquisition is thereby invalidated, the New Jersey Commission has been ousted of its control, despite the intent of Congress to preserve that control.

Likewise, if energy transmitted by Jersey Central to Public Service is held to be sold "in interstate commerce" because some part of it moves instantaneously through the Public Service system to Staten Island, under the contractual arrangements between Public Service and Staten Island, then the sale by Jersey Central to Public Service, being held in interstate commerce, and being at wholesale for resale, is subject to regulation by the Federal Commission under Section 205. What then happens to the jurisdiction of the State commission, which, prior to the enactment of the Federal Power Act, had full control of such sales? If, because some slight part of the energy transmitted between Jersey Central and Public Service is transmitted by another company into another state, where it is consumed, the transaction is "in interstate commerce", and subject to Federal Commission regulation, then is not every sale of electric energy, by whatever electric utility the same is made, a sale "in interstate commerce", subject to Federal Commission regulation, if by reason of interconnections between the purchasing company and other companies, the energy purchased, in any manner whatsoever, shall happen to be transmitted into another state where it is consumed?

Whatever the answer may be to these questions, it is plain that the judgment below, if sustained, will give rise to unhappy conflicts between State and Federal regulatory agencies, and will impair or destroy State regulation in important respects in disregard of the plain purpose of Congress.

CONCLUSION.

The petition for the writ of certiorari should be granted to the end that the erroneous construction of the Federal Power Act by the Court below may be corrected and the erroneous judgment based thereon may be reversed.

Respectfully submitted,

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